No. 77-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

KERR-McGEE CHEMICAL CORPORATION, *Petitioner*,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, *et al.*, *Respondents*.

REPLY BRIEF FOR PETITIONER

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Both the United States and the State of Florida, as the basis for their opposition to Kerr-McGee Chemical Corporation's petition for certiorari, argue that the Department of the Interior is authorized by various environmental statutes to ignore Kerr-McGee's vested rights to phosphate leases established under the Mineral Leasing Act. The novelty and breadth of the arguments made by respondents aptly demonstrate the importance of the substantial federal question posed by this case. The question whether Kerr-McGee's rights to phosphate leases survive the Department's subsequent adoption of new administrative regulations merits review by this Court.

I.

THE IMPORTANCE OF THIS CASE HAS NOT BEEN DENIED

Neither the United States nor the State of Florida have sought to deny the very substantial importance of the issues presented for review. Indeed, although the form of their arguments varies, both recognize that the case presents centrally important questions as to the manner in which the Department of the Interior fulfills its responsibilities under federal environmental statutes and under the federal mining laws.

In this case, Kerr-McGee explored federal lands located in the Osceola National Forest in Florida for four years (from 1965 to 1969) in the expectation that, if it discovered "valuable" deposits of phosphate, it would thereupon be issued the phosphate leases to which Section 9 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by Section 1(a) of the Act of March 18, 1960, 74 Stat. 7, 30 U.S.C. § 211(b) provides the Company "shall be entitled." There is no dispute that after Kerr-McGee's applications for leases were made in 1969 and 1970, the United States Geological Survey, acting as the designee of the Secretary,[1] applied standards used by the USGS since

[1] Although the United States suggests the USGS was merely "subordinate" to the Secretary of the Interior at the time it certified Kerr-McGee's rights to leases (U.S. Opp. p. 7), elsewhere in its brief to this Court the Government implicitly concedes that until February 16, 1977, the USGS had been delegated full responsibility by the Secretary for making decisions whether mineral leases should be issued to prospecting permittees under the Mineral Leasing Act. (*See* U.S. Opp. p. 11 n.9) *No* agency or person within the Department other than the USGS has ever been responsible for determining whether mineral leases should issue to prospecting permittees under the Mineral Leasing Act.

1920 in making lease determinations and determined that Kerr-McGee was statutorily entitled to five phosphate leases.[2] These certifications of Kerr-McGee's rights were made to the Secretary on March 28, 1969 and December 11, 1970. There is no claim that the USGS misapplied the prevailing administrative criteria in making its 1969 and 1970 certifications, or that Kerr-McGee has failed, in any way, to satisfy all regulations and procedures in effect at the time the USGS certified its mineral discovery.

II.

THE COURT OF APPEALS' DECISION IS MANIFESTLY INCONSISTENT WITH THIS COURT'S DECISION IN *GREENE* v. *UNITED STATES*

1. The United States argues that the certifications of Kerr-McGee's rights made by the USGS in 1969 and 1970 were based on an "incorrect legal standard" (U.S. Opp. 7), and that the USGS certifications, accordingly, can be distinguished from the administrative findings in *Greene* v. *United States,* 376 U.S. 149

[2] The United States misleadingly suggests (U.S. Opp. p. 8 n.6) that the criteria applied by the USGS in 1969 and 1970 in establishing Kerr-McGee's rights related solely "to the classification of mineral lands for exploration purposes," and thus, inferentially, were inappropriate for use in determining whether a discovery was sufficiently "valuable" so as to entitle the prospector to a lease. In fact, the standards employed by USGS have been in uninterrupted use by the Department in making decisions whether mineral leases should issue under the Mineral Leasing Act since the Act's passage in 1920. (*See* J.A. 308, 385, 326, 331.) The Department's *Geological Survey Conservation Division Manual* provides expressly that the criteria in question are to be applied by the USGS in making "[d]iscovery [d]eterminations" in passing on the rights of applicants for mineral leases. (*See* § 671.6.1 of the *Manual,* J.A. 250.)

(1964). The Government's contention is that this Court's decisions in *Chrisman* v. *Miller,* 197 U.S. 313, 322 (1905); *Cameron* v. *United States,* 252 U.S. 450, 459 (1920); *Best* v. *Humbolt Placer Mining Co.,* 371 U.S. 334 (1963); *United States* v. *Coleman,* 390 U.S. 599 (1968), and most recently in *Andrus* v. *Charlestone Stone Co.,* ___ U.S. ___, 56 L.Ed.2d 570 (1978), *require* the use of a "marketability" standard in assessing the value of mineral deposits, notwithstanding the fact these decisions have never been applied by the Department to leases under the Mineral Leasing Act. In fact, these decisions upheld the Department's use of a "marketability test" in determining the value of mineral deposits under the General Mining Law of 1972, 30 U.S.C. § 22 *et seq.,* in a context limited to common minerals of little intrinsic value.[3] The Court in *Coleman* held that use of a marketability test *in addition to* the prudent man test was proper in assessing the value of quartzite, "one of the most common of all solid materials," (390 U.S. at 600), to determine whether claims for land under the General Mining Law of 1872 should be honored. There is no suggestion in *Coleman* that a marketability test should be used to determine the value of discoveries of intrinsically valuable minerals. As the Court noted, "there is little room for doubt that [precious metals] can be extracted and marketed at a profit." 390 U.S. at 603. *See Foster* v. *Seaton,* 271 F.2d

[3] In *Coleman,* the Court accepted the lower court's finding that use of a marketability test " 'involves the imposition of a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent-man test . . .' " 390 U.S. at 603.

836, 838 (D.C. Cir. 1959); *Denison* v. *Udall,* 248 F. Supp. 942, 945 (D. Ariz. 1965).[4]

The Government's current interpretation of the Mineral Leasing Act, moreover, is contrary to the interpretation placed on the Act by the Department since the Act's passage in 1920. Indeed, the Government cites no departmental decisions, or decisions by any court, applying such a standard to leases under the Mineral Leasing Act. The Department has consistently upheld the use of the "quantity and quality test" used by the USGS in certifying Kerr-McGee's discoveries, both in formal decisions by the Board of Land Appeals, and in two legal opinions rendered by the Department's Solicitors.[5] (*See* Pet. 13-14.) Under the established

[4] As one authoritative treatise explained this test,

> "[P]resent marketability at a profit developed into an *additional* requirement, over and above the requirements of the prudent man rule, where nonmetalliferous minerals of widespread occurrence were involved." I. *American Law of Mining,* § 4.82, at 710.1-710.2 (1977). (emphasis supplied)

The *American Law of Mining* cites as the most authoritative explanation of the marketability test the Opinion of the Solicitor, "Review of the 'Marketability Rule' as applied to the Law of Discovery," 69 I.D. 145 (1962), in which the Department's Solicitor makes it plain that the marketability test has been applied only in cases under the General Mining Laws to minerals of no intrinsic value. *See,* I. *American Law of Mining,* §4.81 at 708-09. The Government has conceded that the mineral at issue in this case, phosphate, is an intrinsically valuable mineral with a ready market, noting that "phosphate is a scarce resource on a worldwide basis." (U.S. Court of Appeals' Brief, 48).

[5] As found by the district court:

> "[I]n the 1969 and 1970 certifications the USGS relied upon longstanding criteria; that the certifications reflected a consistent application of administrative practices; and that the Secretary, several solicitors and other responsible officials of the Department of the Interior have likewise voiced their support and recognition of the standard and practices." (Pet. App. 8a.)

caselaw of this Court, such a longstanding construction of a statute by the agency charged with the statute's enforcement has a virtually irrebuttable presumption of validity. *Udall* v. *Tallman,* 380 U.S. 1 (1965); *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472 (1915); *United States* v. *Alabama Railroad Co.,* 142 U.S. 615, 621 (1892).

This case, of course, does not present the question whether the Department may, in the future, choose to apply the marketability test in issuing leases under the Mineral Leasing Act, as required for the first time in the Department's May 1976 regulations. Rather, the issue here is limited to the question whether the USGS's failure to apply such a test to Kerr-McGee's discoveries in 1969 and 1970 is such "plain error" as to warrant the Department's refusal to honor the rights established by the USGS. The Department's present assertion—made only in this litigation—that its prior fifty-year interpretation of the Mineral Leasing Act was "legally erroneous," is contrary to the clear weight of authority.[6]

2. The United States argues that, unlike *Greene,* there were ongoing administrative proceedings concerning Kerr-McGee's lease applications at the time that the Department's May 1976 regulations were promulgated. There is no basis for such a claim. The procedures established by the Department under the Mineral Leasing Act for evaluating the rights of pro-

[6] The Government's present position that the criteria used by the USGS were legally erroneous not only is contrary to the past practices of the Department, but is also contrary to the considered judgment of the Department's senior legal officer who in a legal memorandum dated June 30, 1975, concluded that the criteria used by the USGS in certifying the value of Kerr-McGee's discoveries rested on a "defensible legal basis," and that any challenge to these criteria had "defects." (J.A. 100)

specting permittees to mineral leases had been completed some *six* years before this litigation commenced.

Indeed, even the NEPA process had been completed well before this suit commenced. After three years of preparation, the Department issued on June 27, 1974 a *final* environmental impact statement regarding the environmental implications of phosphate mining in the Osceola National Forest. This exhaustive statement has never been challenged. Despite its present suggestion to this Court that the final Osceola impact statement is deficient, the Government finalized the statement in 1974 and gave no indication until it filed its brief with the Court of Appeals in July 1977—three years later—that the impact statement might require supplementation.

3. The State of Florida argues that NEPA should be construed as authorizing the Department to ignore the rights of mining companies if, in the opinion of the Department, honoring such rights might have adverse environmental consequences.[7] This argument is supported by no precedent of this or any other court, and in fact is contrary to well-established principle

[7] The State also argues that Section 9(b) of the Mineral Leasing Act permits the Department, in its discretion, to refuse to issue a lease notwithstanding the value of the permittee's discovery. Such an argument, rejected by the district court (Pet. App. 4a-5a) and apparently not considered by the court below, is supported neither by precedent nor the plain language of the Act which states that a prospecting permittee making a "valuable" discovery of phosphate "shall be entitled to a lease." The Department has consistently construed the Act as creating an automatic, mandatory entitlement to a lease if a "valuable" discovery is made, and both before and during this litigation has rejected the theory urged by the State.

recently restated by this Court in *Flint Ridge Develop. Co.* v. *Scenic Rivers Assn.*, 426 U.S. 776, 788 (1976).

> "Section 102 [NEPA] recognizes, however, that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As we noted in *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973), 'NEPA was not intended to repeal by implication any other statute.'"

There is, moreover, no real conflict between the process of environmental review and analysis required under NEPA, and the rights of mining companies under the Mineral Leasing Act. It is undisputed that the issuance of mineral leases poses *no* threat to the environment. The Department's regulations provide that the development of a mining plan and approval of the plan by the Department are unconditional prerequisites to the commencement of any mining operations. Under these regulations, the Department is entitled to impose any environmental stipulations that are reasonably necessary to protect the environment as a condition of its approval of mining plans. *See* 30 C.F.R. § 231.10. As the district court found,

> "The issuance of a lease will permit plaintiff to commence preparation of a mining plan but their proposals must be approved by the Secretary of the Interior before mining operations actually begin." (Pet. App. 5a-6a)

4. Finally, the United States argues that irrespective of Kerr-McGee's rights to leases, the Court of Appeals correctly reversed the mandamus order of the district court because the Secretary may exercise discretion in establishing the terms of a mineral lease, and mandamus is an inappropriate remedy in the circumstances. But there is no claim that the Department is unable immediately to issue the types of phosphate

leases that have normally been granted prospecting permittees. Rather, the argument is only that unusual environmental stipulations may be appropriate in this case, and that the development of such environmental stipulations may require the exercise of Secretarial discretion.[8] The Government has confused, however, the critically important distinction between the issuance of leases and the development of environmental stipulations that are imposed as conditions to approval of mining plans. The issuance of leases in no sense limits the ability of the Department to develop appropriate environmental stipulations, including the development of additional environmental analyses or a new impact statement, prior to approval of any mining plans. It is at this stage that the Secretary of the Interior (in consultation with the Department of Agriculture) will be in a position to exercise appropriate discretion, as has been the invariable practice in the past.

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[8] The United States misleadingly suggests that the district court's order required the Department to issue Kerr-McGee's leases "immediately" (U.S. Opp. 12), and was thus unreasonable, citing the district court's initial mandamus order (Pet. App. 6a). The Government fails to note that, at its own request, the district court modified the terms of this order to provide only that the Department "is directed to take the necessary steps" to issue the leases to which Kerr-McGee is entitled, thus permitting the development of appropriate lease terms and conditions while at the same time preserving Kerr-McGee's statutory rights. (*See* Pet. App. 8a.)

III.

THE WRIT OF CERTIORARI SHOULD BE ISSUED

For the foregoing reasons, as well as for the reasons stated in Kerr-McGee's Petition, a writ of certiorari should be issued.

Respectfully submitted,

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